U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 10 2005

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general dentistry practice. It seeks to employ the beneficiary permanently in the United States as an associate dentist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director noted the lack of evidence supporting the petitioner's claim of a 2003 merger with a separate corporation.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 28, 2002. The proffered wage as stated on the Form ETA 750 is $121,375 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 2001. On the petition, the petitioner claimed to have been established in 1993 and to currently employ six workers. The petitioner did not list its gross or net annual income.

In support of the petition, the petitioner submitted its 2002 Form 1120 U.S. Corporation Income Tax Return reflecting an incorporation date of July 1, 1994 and an Employer Identification Number of 34-1775515. The petitioner also submitted its tax returns for 2000 and 2001, but these forms have no relevance to the petitioner's ability to pay the proffered wage as of 2002. The 2002 return reflects the following information:

| | |
|---|---|
| Net income | ($17,568) |
| Current Assets | $0 |
| Current Liabilities | $0 |
| Net current assets | $0 |

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 5, 2004, the director requested additional evidence pertinent to that ability, including any Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary.

In response, the petitioner submitted a 2002 Form W-2 the petitioner issued to the beneficiary reflecting wages of $111,891.58, less than the proffered wage. The petitioner also submitted the beneficiary's payroll records for February 2002 through November 16, 2002. According to these records, the petitioner paid the beneficiary a total of $46,110.54 from June 28, 2002 (the priority date) through the end of the year, half of 2002. Half of the proffered wage is $60,687.50, $14,576.96 more than the petitioner paid the beneficiary after the priority date in 2002.

The petitioner's president, Dr. [redacted], asserts that in 2003, the petitioner merged with Dr. [redacted] other dental practice, Five Points Dentistry. The petitioner submits the 2000, 2001, 2002 and 2003 Forms 1065 U.S. Return of Partnership Income for [redacted] Employer Identification Number [redacted] According to the Form W-2 submitted, in 2003 [redacted] paid the beneficiary $27,242.45, $94,132.55 less than the proffered wage. [redacted] shows $52,759 in net income and $41,757 ($41,866 cash - $109 in other current liabilities) in net current assets in 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage after 2002 as it had not provided evidence of the claimed merger with [redacted]

On appeal, counsel asserts that [redacted] is the "successor-in-interest" to the petitioner. The petitioner submits a letter from its president, incorporation/organizational documentation for the petitioner and [redacted] and dissolution documentation for the petitioner.

Counsel acknowledges that in order to qualify as a successor-in-interest, an entity must assume the rights, duties, obligations and assets of the original petitioner. Counsel cites a memorandum for this principle. We note, however, that the controlling authority is *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In addition to requiring evidence that the successor entity has assumed all the rights, duties and obligations, that case requires evidence that the predecessor entity had the ability to pay the proffered wage as of the priority date.

Dr. [redacted] asserts that [redacted] the successor-in-interest to the petitioner because (1) the job offer remains the same and is in the same metropolitan statistical area, (2) the petitioner and Five Points Dentistry have paid the beneficiary's wages, (3) a significant number of patients transferred from the petitioner to [redacted] (4) [redacted] assumed the beneficiary's immigration-related obligation and has control over the beneficiary's employment and (5) the "two entities have operated in the same premises since 2000 and the principals of Five Points, Drs. [redacted] and Thomas have worked professionally in the same practice since 2000." Dr. [redacted] further asserts that as the two entities have occupied the same premises since 2000 and have the same principals, "it was not seen as necessary to document specific asset and liability assumptions, lease terminations, client transfers, etc."

The petitioner submitted the articles of incorporation for the petitioner, filed July 1, 1994. The 2002 Biennial Report of Professional Corporation for the petitioner lists Dr. [redacted] the sole shareholder. The certificate of dissolution was executed by Dr. [redacted] on February 7, 2003 and is stamped November 25, 2003. Finally, the articles of organization for Five Points Dentistry, filed in March 2000, lists Dr. [redacted] and Dr. [redacted] as the sole members.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a

salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The director stated that the 2002 Form W-2 issued by the petitioner to the beneficiary "shows that the petitioner paid the beneficiary $111,891.58 in 2002. This amount is greater than the offered wage." The director erred in this determination. The proffered wage is $121,375, $9,483.42 more than the petitioner paid the beneficiary in 2002. Thus, in the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002.

We acknowledge that the petitioner need only demonstrate its ability to pay the proffered wage as of the priority date, which in this case is half way through 2002. We will not, however, consider 12 months of net income or wages paid towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of net income or wages paid towards paying the annual proffered wage. CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period). Any wages paid to the beneficiary prior to the priority date were no longer available to pay the remainder of the proffered wage after that date. As stated above, the actual wages paid to the beneficiary after the priority date total only $46,110.54, $14,576.96 less than half the proffered wage, which amounts to $60,687.50. Thus, even if we agreed to prorate the proffered wage, the petitioner has not demonstrated, through wages actually paid, an ability to pay half the proffered wage during the second half of 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In response to the director's request for additional evidence, the petitioner submitted an accountant's letter explaining that the $31,340 net loss from Form 4797, Sales of Business Property (Also Involuntary Conversions and Recapture Amounts Under Sections 179 and 280F(b)(2)), listed on the first page of the 2002 tax return, line 9, was the result of disposing of obsolete equipment, and did not reflect a true loss. The actual Form 4797, however, is not included with the petitioner's 2002 tax return. Moreover, the petitioner's assets diminished to zero by the end of 2002, presumably in anticipation of the dissolution. We cannot conclude that a deduction resulting from disposing of one's assets in anticipation of dissolution is a favorable factor in establishing the petitioner's ability to pay the proffered wage on a continuing basis.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the

proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2002, however, were $0.

Contrary to the conclusion reached by the director, the petitioner has not demonstrated that it paid the full proffered wage in 2002 or one half of the proffered wage after the priority date in 2002. In 2002, the petitioner shows a net loss and no net current assets. We withdraw, therefore, the director's finding that the petitioner demonstrated the ability to pay the proffered wage in 2002.

As stated above, even if we were to conclude that [redacted] is the successor-in-interest to the petitioner, that entity would still need to demonstrate the petitioner's ability to pay the proffered wage as of the date of filing. For the reasons discussed above, the record does not reflect such ability.

Regardless, the record does not reflect that [redacted] is the successor-in-interest to the petitioner. While the articles of organization for [redacted] reflect the same address as the petitioner, its 2000, 2001 and 2002 tax returns all list a separate address, the address where the beneficiary currently works. A corporation is a separate legal entity from its shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Thus, the fact that the sole shareholder of the petitioner is one of two members of [redacted] is not determinative. As of the end of 2002, the petitioner had no assets or liabilities according to its schedule L. It filed a certificate of dissolution in 2003.[2] Whatever the explanation, the record contains no written agreement for [redacted] to assume the rights, duties and obligations of the petitioner and the petitioner offers no legal basis for a presumption that a limited liability company with similar ownership to a dissolved corporation that operates at a separate address and attracts some patients

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[2] According to Ohio Rev. Code § 1701.791, a corporation can merge or consolidate with a non-corporate entity. According to Ohio's official Secretary of State website, www.sos.state.oh.us, Form 551 is a certificate of merger and Form 550 is a certificate of consolidation. Both forms permit the successor entity to be a limited liability company like [redacted] Yet, the record reflects that the petitioner did not file either Form 551 or Form 550. Rather, the petitioner filed a certificate of dissolution.

from the dissolved corporation is presumed by law to assume the rights, duties and obligations of the dissolved corporation.[3]

In light of the above, we cannot conclude that [redacted] is the successor-in-interest to the petitioner. Finally, even if we were to conclude that [redacted], in fact, the proper successor-in-interest to the petitioner, [redacted] has not demonstrated its own ability to pay the proffered wage in 2003. As stated above, [redacted] paid the beneficiary $27,242.45 in 2003, $94,132.55 less than the proffered wage. In that year, [redacted] shows $52,759 in net income and $41,757 in net current assets. Neither amount is sufficient to cover the difference between the amount paid to the beneficiary and the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER**: The appeal is dismissed.

[3] According to Ohio Rev. Code § 1701.88, a dissolved corporation retains its corporate form while winding up. In addition, according to Ohio Rev. Code § 1701.90, a receiver is appointed for dissolved corporations to resolve outstanding issues.